United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

7-14-7 76-7522

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARGARET TOWNSEND,

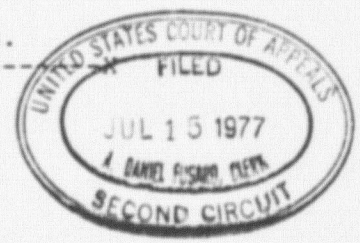
Plaintiff-Appellee,

-against-

P/S

NASSAU COUNTY MEDICAL CENTER, Dr. Donald H. Eisenberg, Superintendent, NASSAU COUNTY CIVIL SERVICE COMMISSION, Gabriel Kohn, Chairman; Edward S. Witanowski, Edward A. Simmons, Adele Leonard, Executive Director of Nassau County Civil Service Commission; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; Esra H. Posten, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.



PETITION FOR REHEARING

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Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, the above-named appellee, MARGARET TOWNSEND, respectfully petitions this Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, appellee presents to the Court the following:

1. This Court rendered decision in this matter on June 30, 1977, reversing the judgment in favor of plaintiff-appellee with directions to dismiss the complaint. The crux of the decision is that plaintiff failed to make out a prima facie case of Title VII race discrimination against the defendants, who discharged plaintiff because she did not possess a college degree, notwithstanding the introduction of local census statistics which demonstrated the educational disparity between blacks and whites.

2. It is respectfully submitted however, that in light of the recent holding in Dothard v. Rawlinson, _____U.S._____, 45 L.W. 4888 (June 27, 1977), the above-entitled matter should be reheard and reconsidered. The

Supreme Court in Dothard followed the approach of Griggs v. Duke Power Co., 401 U.S. 424 and held that a showing based on general national statistics of the disproportionate impact of a facially neutral employment standard was sufficient to make out a prima facie case. No other showing was made by the plaintiff and the Court specifically rejected the argument that comparative statistics concerning actual applicants were necessary. Dothard, supra at 4890.

3. By holding that "statistics relating only to general population and not to the employment practices of the particular defendant, [are in]sufficient to raise such a presumption against the college degree requirement," this Court misapprehends the law with respect to the requirements of a prima facie showing under Title VII, particularly in light of Dothard, supra, which, like the case here, did not involve an assertion of purposeful discriminatory motive.

4. It is respectfully submitted that statistics relating to defendant's employment

practices would be of little probative value because there are so few people working in the blood bank in particular and in the laboratories overall (A 277, A278-279) Cf. Morita v. Southern California Permanente Medical Group, 541 F.2d 217, 220 (9th Cir, 1976); Harper v. Trans World Airlines, 525 F2d 409 (8th Cir, 1975). Indeed, any black person who has considered employment with the defendants since 1967, but who does not possess a college degree would, upon reading the job specifications, most likely disqualify himself. Cf. Dothard, supra at 4890.

5. This Court relied on the affidavit of Ronald J. Levinson (fn. 8) when it noted that newly-promulgated prerequisites were applied to each employee in a racially neutral manner. The Court however overlooks that the three whites mentioned in the affidavit were merely denied permission to take the exam (A 34). There is no evidence whatsoever that these three whites were, like plaintiff, discharged. Indeed, one of those three, Jean Milson, was given two chances to pass the exam,

Milson v. Leonard, ____F. Supp.____, E.D.N.Y., Docket No. 74 C 904 (1974, Dooling, J), Slip Opinion at p. 3, and after failing twice, was merely demoted. Plaintiff, a black, was fired, and she was rehired only after she filed charges against defendants with the Human Rights Commission and the E.E.O.C. (A 10, A 86). Had defendants been able to do so, they were free to adduce evidence that those three whites were, like plaintiff, discharged.

6. While requiring plaintiff to make a prima facie showing based on "defendant-related" statistics, this court overlooks the uncontroverted fact that plaintiff was the only black Medical Technologist I working in the Blood Bank. (A 277-278) The evidence indicates that she was also the only one discharged. At the time of trial, all Medical Technologist I's were white (A 277-278). (Mr. Appelwaite, the only other black, is a Medical Technologist III) In other words, Mrs. Townsend, a black, was discharged so that a white Medical Technologist I could take her place.

7. It is respectfully submitted that this Court misapprehends the law with respect

to what a Title VII plaintiff may show when it viewed the lower court's decision as ad hoc. That the lower court awarded relief only to Mrs. Townsend is consonant with Albermarle Paper Co. v. Moody, 422 U.S. 426 (1975), which held that "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship", supra at 425. By the special circumstances of this case, i.e. by presenting proof of long term satisfactory job performance, Mrs. Townsend presents just such an alternative.

8. The lower court's limitation of its ruling on validation to "the special circumstances of this case" is also consonant with what a Title VII defendant must show, depending on circumstances. 29 C.F.R. 1607.5 (c)(2)(iii) provides that in "hiring an unqualified applicant...a relatively low relationship may prove useful when the [economic and human] risks are relatively high." In other words,

when considering whether to hire an applicant whose competence is as yet unknown, an employer hiring for jobs involving human risks may more easily justify requiring formal education as an indicia of competence. Mrs. Townsend presented, and the lower court perceived, the unique circumstance of having already demonstrated unquestioned competence. She, unlike future, unknown applicants, was not being hired, thus imposing on defendants a higher burden of proof as to her, particularly since she continues to perform the same duties, in spite of the human risk. Cf. 29 C.R.R. 1607.5 (c)(2)(ii) vis a defendant's burden when "unqualified" persons become satisfactory employees.

9. It is respectfully submitted that this Court misapprehends the effect of sustaining the prima facie case here: that every employer with a college degree requirement would have the burden of justifying it. On the contrary, if an employer "discerns fallacies or deficiencies in the evidence offered by plaintiff, he is free to adduce countervailing

evidence of his own." Dothard, supra at 4890. In this case, as in Dothard, no such effort was made. Instead defendants attempted to justify the disqualification of Mrs. Townsend by a survey team whose purpose was to "rectify the present unfortunate situation" of confusion and lack of uniformity which "resulted in variations in grade - and therefore salary - for people performing the same or similar jobs" (Plaintiff's Exhibit 13 (not part of Joint Appendix) Appendix A Letter, Feb. 14, 1966). This survey ultimately determined that Mrs. Townsend was doing the job of and should be paid as a Medical Technologist I. (A 68-69)

10. If an employer cannot or does not countervail statistical prima facie showing, the burden then imposed on him varies with the circumstances, 29 C.F.R. 1607.5 et seq, and it is a burden which he "should not be unwilling to assume." Vulcan Society of New York Fire Dept. v. Civil Service Commission, 490 F2d 387 393 (2d Cir, 1973). The statistics introduced by Mrs. Townsend in support of her

prima facie case demonstrate that a college degree is not a "racially neutral requirement" whatever the reasons for its imposition. If this requirement is arbitrary, artificial or unnecessary, as it is in the case of Mrs. Townsend, it violates Title VII. Griggs, Supra.

WHEREFORE, appellee prays that a rehearing be granted and that on rehearing, this Court's opinion dated June 30, 1977, be withdrawn and the Court enter a new opinion affirming the judgment of the District Court.

July 12, 1977

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CERTIFICATE

As counsel for the appellee, I hereby certify that the foregoing petition for rehearing is not frivolous, and is presented in good faith for rehearing particularly in light of the Supreme Court's recent holding in Dothard v. Rawlinson, ____U.S.____, 45 USLW 4888 (June 27, 1977, and is not interposed for purposes of delay.

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 76-7522

MARGARET TOWNSEND,

Plaintiff-Appellee

Plaintiff

against

NASSAU COUNTY MEDICAL CENTER, et al,

Defendants- Appellants.

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NASSAU *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
130 Jerusalem Avenue, Hempstead, New York 11550

That on July 13, 1977 *19* *deponent served the annexed*
PETITION FOR REHEARING

on The County Attorney of Nassau County
attorney(s) for
in this action at 1 West Street, Mineola, New York 11501
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office ~~official~~ depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me July 13, 1977

Susan T. Kluewer
SUSAN T. KLUEWER
NOTARY PUBLIC, State of New York
No. 24-4510292
Qualified in Kings County
Term Expires March 30, 19 77

Geraldine Moore
The name signed must be printed beneath
GERALDINE MOORE